

130 FERC ¶ 61,045
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Power and Water Resources Pooling Authority
Complainant,

v.

Docket No. EL10-7-000

Pacific Gas and Electric Company
Respondent.

ORDER ON COMPLAINT, ESTABLISHING
EVIDENTIARY HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued January 21, 2010)

1. On October 21, 2009, pursuant to section 206 of the Federal Power Act (FPA),¹ the Power and Water Resources Pooling Authority (Pooling Authority) filed a complaint against Pacific Gas and Electric Company (PG&E), alleging that PG&E's refusal to provide open access wholesale distribution service at two new delivery points of the Pooling Authority's retail customer is unjust, unreasonable, unduly discriminatory, and violates the terms of PG&E's Wholesale Distribution Tariff. The Pooling Authority asks the Commission to confirm that it meets the requirements for service under PG&E's open access Wholesale Distribution Tariff and to require PG&E to provide service to the Pooling Authority at the new delivery points. Because we find there are issues of material fact that cannot be resolved on the basis of the written record,² we establish a trial-type evidentiary hearing and settlement judge procedures, and set a refund effective date of October 21, 2009, the date the complaint was filed.

¹ 16 U.S.C. § 824e (2006).

² See *Cajun Elec. Power Coop. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1995) (citing *Vermont Dept. of Pub. Serv. v. FERC*, 817 F.2d 127, 140 (D.C. Cir. 1987); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993)).

I. Background

2. PG&E has historically transmitted federal hydroelectric power generated by the Western Area Power Administration (Western) and its predecessors, under numerous contracts, to a variety of customers, including agricultural pumps in California's Central Valley. Western and PG&E executed these contracts in 1967 in connection with the construction of the Pacific Northwest-Pacific Southwest Intertie, a two-line facility that runs from the Pacific Northwest through California.³ These long-term contracts form the foundation of the relationship between Western and PG&E. From time to time since the 1960s, Western and PG&E have revised agreements between them, but significant revisions occurred in 2004, because many of these contracts, including Contract No. 2948A,⁴ between Western and PG&E were set to expire on December 31, 2004. Significant revisions were also necessitated by the need to integrate these bilateral agreements with the creation of the California Independent System Operator Corporation (CAISO) and Open Access Transmission Service. Revisions to these contracts, including Contract No. 2948A, were approved by the Commission in 2004 as part of a settlement proceeding.⁵ In these Commission-approved agreements, PG&E agreed to provide wheeling service for Western for hundreds of allegedly retail delivery points, most interconnected long before 1992, when Congress added section 212(h) to the FPA.⁶ According to PG&E, many of these loads include most of the Pooling Authority members.⁷

3. The Pooling Authority states that it is a publicly owned electric utility organized under California state law⁸ as a joint powers authority. The Pooling Authority's

³ In northern California, Western owns one of the Pacific Intertie transmission lines from the Malin substation to the Round Mountain substation. PG&E controls the other line in the Pacific Intertie.

⁴ Under Contract 2948A, PG&E provided service to Western's end-use customers, including many customers currently served by the Pooling Authority. *Pacific Gas & Electric Co.*, 109 FERC ¶ 61,255, at P 82 (2004).

⁵ *Pacific Gas & Electric Co.*, 109 FERC ¶ 61,255 (2004).

⁶ 16 U.S.C. § 824h (2006). Section 212(h) of the FPA precludes the Commission from ordering mandatory retail wheeling and prohibits sham wholesale transactions.

⁷ PG&E Answer at 4.

⁸ The Pooling Authority cites to Cal. Water Code §§ 22115-22124. *See* Pooling Authority Complaint at 2 n.2.

members are irrigation districts organized and operating in California.⁹ Its Board of Directors includes “stakeholders,” which are water agencies taking retail electric service from the Pooling Authority.¹⁰

4. The Pooling Authority states that it has been providing retail service since January 1, 2005.¹¹ The Pooling Authority is also a Scheduling Coordinator in the CAISO Balancing Authority Area.¹²

5. The Pooling Authority states that one of its principal functions is to pool and distribute its customers’ respective allocations of federal preference power marketed by Western. The Pooling Authority also purchases and supplies its customers with supplemental power, which it acquires through bilateral transactions in the CAISO control area.¹³ According to the Pooling Authority, PG&E wheels the power resources that the Pooling Authority purchases from Western and other wholesale suppliers to the Pooling Authority-designated points of delivery.¹⁴

6. Most of the Pooling Authority’s customers are served under an existing settlement agreement filed and accepted by the Commission in 2004.¹⁵ For the Pooling Authority and its customers, this settlement agreement¹⁶ consists of an agreement among PG&E, Western, the Pooling Authority and the Pooling Authority’s participants. PG&E and the

⁹ The Pooling Authority’s members include: Banta-Carbona Irrigation District, Byron-Bethany Irrigation District, James Irrigation District, Glenn-Colusa Irrigation District, Princeton-Cordura-Glenn Irrigation District, Provident Irrigation District, the West Side Irrigation District, and West Stanislaus Irrigation District.

¹⁰ These stakeholders include: Arvin-Edison Water Storage District, Cawelo Water District, Reclamation District 108, Santa Clara Valley Water District, Sonoma County Water Agency, and Wetlands Water District.

¹¹ Pooling Authority Complaint at 2.

¹² *Id.* at 6.

¹³ *Id.* at 5-6.

¹⁴ *Id.* at 6.

¹⁵ *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,255 (2004).

¹⁶ *See* Pooling Authority Complaint Appendix C.

Pooling Authority also later entered into an Interconnection Agreement and three Wholesale Distribution Tariff Service Agreements.¹⁷

7. Among the Pooling Authority's irrigation district members is the Glenn-Colusa Irrigation District, which is also a retail customer of the Pooling Authority.¹⁸ On July 23, 2009, pursuant to section 15 of PG&E's Wholesale Distribution Tariff, the Pooling Authority asked PG&E to provide Wholesale Distribution Tariff service at two new delivery points in the Glenn-Colusa Irrigation District.¹⁹ The Pooling Authority explains that the new delivery points are two well sites within Glenn-Colusa's Irrigation District with a peak load of approximately 186.5 kW. The Pooling Authority states that Glenn-Colusa Irrigation District and the California Department of Water Resources are jointly developing those well sites to improve understanding of regional groundwater hydro-geologic characteristics as part of a state-wide effort to utilize California water resources more efficiently. In addition, the Pooling Authority states that in connection with this service request, the Pooling Authority also asked PG&E to enter into a Wholesale Distribution Service Agreement and to amend the Interconnection Agreement between PG&E and the Pooling Authority.

8. The Pooling Authority further states that on August 7, 2009, PG&E denied its service request based on its assessment that the Pooling Authority is not an "Eligible Customer" under PG&E's Wholesale Distribution Tariff. According to the Pooling Authority, PG&E concluded that the Pooling Authority is not an Eligible Customer because it is not an "electric utility" under California state law.²⁰ The Pooling Authority further states that following PG&E's denial of its request, the Pooling Authority continued to attempt to reach an amicable resolution of this dispute, to no avail. Moreover, the Pooling Authority states that it has continually maintained that it will provide and pay for any and all intervening distribution facilities necessary to ensure that the service to Glenn-Colusa fully complies with the requirements for wholesale service, including the requirement under section 212(h)(2)(B) of the FPA that the Pooling Authority "utilize transmission or distribution facilities that it owns or controls to deliver

¹⁷ See *Pacific Gas and Electric Co.*, Delegated Letter Order, Docket No. ER08-398-000 (Feb. 15, 2008).

¹⁸ See Pooling Authority Complaint at 2.

¹⁹ *Id.* at 7.

²⁰ The Pooling Authority explains that PG&E contends that the Pooling Authority is not an electric utility under California law because the participation of non-member water agency stakeholders on the Pooling Authority's Board of Directors nullifies the Pooling Authority's authority to sell electricity at retail. *Id.* at 8.

all such electric energy”²¹ to Glenn-Colusa. According to the Pooling Authority, its efforts to resolve the dispute have failed.

II. Complaint

9. On October 21, 2009, the Pooling Authority filed the complaint in the above-captioned proceeding, asking the Commission to find that PG&E’s refusal to service two new delivery points under the Wholesale Distribution Tariff violates the plain terms of the Commission-accepted open access tariff and is unjust, unreasonable and unduly discriminatory. The Pooling Authority asks the Commission to order the requested interconnection and wholesale distribution service on an expedited basis. In its complaint, the Pooling Authority argues that the terms and conditions governing its request for wholesale distribution service are set forth in PG&E’s Wholesale Distribution Tariff. According to the Pooling Authority, the applicable sections of the tariff provides that for any entity to receive wholesale distribution service under the tariff it must be: (1) a wholesale entity taking transmission service through the CAISO; (2) that is an “electric utility or any person generating electric energy for sale for resale...”; and (3) that requests service to new delivery points of new or existing customers.²² The Pooling Authority argues that it satisfies each of these requirements. With respect to the first element, the Pooling Authority states that it is a wholesale entity taking transmission service through the CAISO, noting that it has been and continues to be a transmission customer of the CAISO and serves as a Scheduling Coordinator within the CAISO Balancing Authority Area. It further explains that it satisfies the “wholesale entity” requirement because it purchases, takes title to, resells and bills customers for electricity in the CAISO footprint.

10. As for the second element, the Pooling Authority points out that the crux of this dispute rests on PG&E’s assertion that the Pooling Authority is not an electric utility, and therefore not an Eligible Customer under the Wholesale Distribution Tariff. The Pooling Authority disagrees with PG&E, and insists that it meets the definition of “electric utility” under both federal and state law. The Pooling Authority points out that PG&E does not dispute that the Pooling Authority is a state agency. The Pooling Authority further states that it purchases electricity from Western and other sellers, and resells that electricity to the Pooling Authority’s customers. According to the Pooling Authority, it purchases, takes title to, resells, and bills customers for electric energy in the CAISO Balancing Authority Area. The Pooling Authority further states that it sends its customers invoices that reflect each customer’s energy usage, as well as the costs of wholesale transmission, distribution, and ancillary services incurred by the Pooling

²¹ 16 U.S.C. § 824h(2)(B) (2006).

²² See Pooling Authority Complaint at 9-11.

Authority for the delivery of power to that customer, and other costs of service, including the Pooling Authority's public purpose program costs. The Pooling Authority thus concludes that it qualifies as "a person or Federal or State agency ... that sells electric energy" under section 3(22)(A) of the FPA.²³

11. The Pooling Authority further argues that PG&E does not dispute the Pooling Authority's claim that it sells electricity, but rather, PG&E relies on California state law to contend that the Pooling Authority is not an electric utility. The Pooling Authority stresses that it does not accept PG&E's view that California state law governs the definition of "electric utility" in the FPA and in a Commission-jurisdictional tariff. However, the Pooling Authority argues that, even under California law, it qualifies as a public utility. Further, the Pooling Authority points out that various California regulatory agencies, including the California Energy Commission, recognize the Pooling Authority as a local publicly owned electric utility.

12. The Pooling Authority also asserts that wholesale distribution service to the new delivery points in Glenn-Colusa is not precluded by section 212(h) of the FPA²⁴ because it intends to own or control distribution facilities that will be used to deliver electricity to the new delivery points. The Pooling Authority adds that it will provide and pay for any and all distribution facilities necessary to ensure that the service to Glenn-Colusa fully complies with the requirements for wholesale service, including the requirement that the Pooling Authority "utilize transmission or distribution facilities that it owns or controls to delivery all such electric energy" to Glenn-Colusa.

13. In addition, the Pooling Authority alleges that PG&E's tariff violation would have a financial impact and that, based on 2008 rates, Glenn-Colusa could be expected to save approximately \$63,745.40 by taking retail electric service from the Pooling Authority for the new wells instead of PG&E's bundled agricultural service.

14. Finally, the Pooling Authority has requested fast track processing of its complaint so service can be implemented by the beginning of 2010.

III. Notice of Filing and Responsive Pleadings

15. Notice of the Pooling Authority's complaint was published in the *Federal Register*, 74 Fed. Reg. 57307 (2009), with protests and interventions due on or before November 10, 2009. California Department of Water Resources State Water Project, Southern California Edison Company and Northern California Power Agency each filed

²³ 16 U.S.C. § 796(22)(A) (2006).

²⁴ 16 U.S.C. § 824k(h) (2006).

timely motions to intervene. On November 10, 2009, PG&E filed an Answer to Complaint and Motion to Dismiss or Stay the action (PG&E Answer/Motion). On November 25, 2009, the Pooling Authority filed an Answer in Opposition to PG&E's Motion to Dismiss or Stay the Complaint Proceeding, and a Motion for Leave to Answer PG&E's Answer (Pooling Authority's Answer).

16. In its answer, PG&E denies the material allegations in the Pooling Authority's claim that it is entitled to serve "the broad public" under California law and, therefore, is entitled to wholesale distribution service as a matter of law.

17. PG&E elaborates that the Pooling Authority is not a public utility under either state or federal law. PG&E asserts that the Pooling Authority owns no generation, no transmission lines, and no distribution facilities.²⁵ In support of its position, PG&E states that the Pooling Authority is simply a joint effort of fifteen customers to meet their own end-use loads. PG&E asserts that the Pooling Authority does not serve the public, has no identified service area, and provides no electric service to anyone other than the fifteen customers that comprise the agency. PG&E states that the Pooling Authority provides consulting and coordinating services for its fifteen members; arranges for scheduling coordinator services for Western that meets most of its end-users' load; lines up a small amount of supplemental power; and arranges for these fifteen customers to coordinate on various energy efficiency and water usage issues. PG&E points out that various consultants and energy service providers offer such services to end-use customers, but doing so does not convert them to public utilities.

18. In addition, PG&E points out that on November 10, 2009, it filed a declaratory relief action against the Pooling Authority to resolve the state law issue of whether the Pooling Authority is a utility entitled to service electricity at retail "to the broad public" under California law. Accordingly, PG&E argues that the Commission should dismiss or stay the case pending the outcome of the state court proceeding.

19. Further, PG&E contends that the Pooling Authority is making a "sham wholesale service request," directly prohibited by both the California law and section 212(g) and (h) of the FPA.²⁶ PG&E states that end-use customers meeting their own loads are not public utilities entitled to wholesale distribution service, whether acting alone, or through a joint powers agency. PG&E states that, nevertheless, it has made limited accommodations for the Pooling Authority members in the past, and is willing to explore those options again.²⁷ PG&E states that it was in discussions with the Pooling Authority

²⁵ PG&E Answer at 1.

²⁶ 16 U.S.C. §§ 824k(g) and (h) (2006).

²⁷ PG&E Answer at 2.

when it abruptly filed this complaint. PG&E urges the Commission to dismiss or stay the complaint because it is a matter of state law that should be resolved by California state courts.

20. In its answer to PG&E's answer and motion to dismiss or stay the proceeding, the Pooling Authority asks the Commission to deny PG&E's motion to dismiss or delay the instant proceeding for the following reasons. First, the Pooling Authority argues that it has satisfied every criterion under state and federal law and under PG&E's Wholesale Distribution Tariff to qualify for the requested service. According to the Pooling Authority, PG&E mischaracterizes the nature of the Pooling Authority's operations. The Pooling Authority contends that it provides full-service, full requirements electricity services to its customers and that it is the direct and only obligor in the performance of utility-function obligations. The Pooling Authority states that it has entered into numerous power sales agreements with multiple power suppliers and has two long-term renewable energy purchase agreements for the output of renewable resources in northern California. The Pooling Authority adds that while it does not currently own generation, it has rights to a generation entitlement share in a power project currently under development.

21. The Pooling Authority acknowledges that it does not own any distribution facilities and explains that it has not needed to own distribution facilities in light of PG&E's willingness until now to provide wholesale distribution service to serve the Pooling Authority's customers' expanding loads. The Pooling Authority also notes that it has contracted directly with PG&E for interconnection and Wholesale Distribution Tariff service to several loads owned by the Pooling Authority customer Reclamation District 108. The Pooling Authority also contends that while it does not currently own any distribution facilities, it does "control" the intervening distribution facilities used to serve Reclamation District 108.²⁸

IV. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. The Pooling Authority's answer to PG&E's motion to dismiss or stay the proceeding was timely under Rule 213(a)(3) and (d), 18 C.F.R. § 385.213 (2009). Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to an answer, unless otherwise ordered by the decisional authority. We will accept the Pooling Authority's

²⁸ Pooling Authority's Answer to PG&E's Answer and Motion to Dismiss at 12.

answer in its entirety because it provided information that assisted us in our decision-making process.²⁹

B. Commission Determination

23. Under PG&E's Wholesale Distribution Tariff, in order to qualify for the service, an entity must be an Eligible Customer as defined in the tariff.³⁰ The central issue in this case is whether the Pooling Authority qualifies as an Eligible Customer under the Commission-accepted open access Wholesale Distribution Tariff,³¹ which governs rates, terms and conditions of Commission-jurisdictional service, or whether requiring additional delivery points is precluded by prior Commission-approved settlements. Section 2.16 of PG&E's Wholesale Distribution Tariff defines the term "Eligible Customer" to include "any electric utility." Section 2.16 of the tariff also provides in pertinent part that:

[w]ith respect to Distribution Service that the Commission is prohibited from ordering by [s]ection 212(h) of the [FPA], such entity is eligible only if the service is provided pursuant to a state requirement that the Distribution Provider offer the Distribution Service, or pursuant to a voluntary offer of such service by the Distribution Provider.

24. Thus, in order to determine whether the Pooling Authority qualifies as an Eligible Customer under PG&E's Wholesale Distribution Tariff, we must examine whether it meets the definition of "electric utility" under FPA section 3(22)(a)³² and

²⁹ We also note that the Pooling Authority's answer to PG&E's answer was also in part an answer to PG&E's motion to dismiss or stay the proceeding. The Pooling Authority's answer to PG&E's motion is permitted pursuant to Rule 213(a)(3), 18 C.F.R. § 385.213(a)(3) (2009).

³⁰ Section 1.2 of PG&E's Wholesale Distribution Tariff provides that the distribution service under the tariff is available to new and existing Distribution Customers. A Distribution Customer is defined in section 2.16 of the tariff as an Eligible Customer. *See* Pooling Authority Complaint, Attachment 4.

³¹ We note that PG&E's Wholesale Distribution Tariff was accepted for filing in *Pacific Gas and Electric Co.*, 81 FERC ¶ 61,323 (1997).

³² 16 U.S.C. § 796(22)(A) (2005). PG&E argues that the Wholesale Distribution Tariff includes a California choice of law provision, so not only is California the proper forum, but according to PG&E, California law should also govern the dispute. PG&E Answer at 6-9, PG&E Complaint in Superior Court for Declaratory Relief at P 8. However, the relevant governing law provision of the tariff provides: "*Except as*

(continued)

whether, even if it meets this definition, section 212(h) of the FPA³³ prohibits the Commission from ordering PG&E involuntarily to provide the new service. We therefore find that because analysis of the main issue of this dispute involves interpretation and application of the relevant provisions of the Federal Power Act to specific facts of the instant case, the Commission is the proper forum to resolve the instant dispute under federal law. We further emphasize that this case hinges on interpretation of an open-access Wholesale Distribution Tariff on file with the Commission, and the Commission has an overriding interest in ensuring eligibility for service under its open access policy, to ensure non-discriminatory access to service.³⁴ We also note that the analysis of this dispute involves interpretation of prior Commission-approved settlements. Accordingly, we reject PG&E's assertion that state court is the proper forum for resolving this dispute, and deny its request to stay or dismiss the proceeding. We note that our determination in this proceeding should not prejudice the outcome of the pending state court proceeding to the extent it involves matters of state law.

25. Next, we turn to the issue of whether the Pooling Authority is an electric utility. Section 3(22) of the FPA defines "electric utility" as "a person or Federal or State

otherwise provided by federal law, this Tariff shall be governed by and construed in accordance with, the laws of the state of California." Wholesale Distribution Tariff § 10 (emphasis added). Therefore, to the extent there is a conflict between the federal and state definition of "electric utility," federal law has "otherwise provided," and the federal definition of electric utility controls. *See South. Cal. Edison Co. v. FERC*, 502 F.3d 176, 180 (D.C. Cir. 2006) (construing identical language in a governing law clause in an agreement on file with the Commission to find that federal law controls if there is a conflict with state law).

³³ 16 U.S.C. § 824h (2006).

³⁴ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part, remanded in part on other grounds sub nom, Transmission Access Policy Study Group, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *cert. granted*, 69 U.S.L.W. 3574 (Nos. 00-568 (in part) and 00-809) and *cert. denied, id.* (No. 00-800)(U.S. Feb. 26, 2001).

agency ... that sells electric energy.”³⁵ The Pooling Authority is a State agency organized under California law.³⁶ The Pooling Authority states that on behalf of its customers, irrigation districts, it purchases, pools, resells and distributes energy marketed by Western.³⁷ Also, the Pooling Authority states that it purchases, takes title to, resells, and bills customers for supplemental purchases of electric energy made in the CAISO Balancing Authority Area.³⁸ PG&E disputes these assertions. Specifically, it argues that the Pooling Authority merely coordinates for its members and provides consulting services.³⁹ This appears to present an issue of material fact that requires further investigation.

26. Even if the Pooling Authority were clearly demonstrated to be an electric utility under the FPA, that alone does not automatically qualify the Pooling Authority as an Eligible Customer under PG&E’s Wholesale Distribution Tariff. The Pooling Authority must also satisfy the exclusion to the prohibition on mandatory retail wheeling and sham transactions set forth in FPA section 212(h)(2). Specifically, section 212(h) of the FPA provides in pertinent part that:

No order issued ... shall be conditioned upon or require the transmission of electric energy:...

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:

(A) such entity is ... a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision) ... and

(B) such entity was providing electric service to such ultimate consumer on October 24, 1992 [the date of enactment of this subsection], or would utilize

³⁵ 16 U.S.C. § 796(22)(A) (2006).

³⁶ See Pooling Authority Complaint at 2 n.2 *citing* Cal. Water Code §§ 22115-22124.

³⁷ *Id.* at 11-12

³⁸ *Id.*

³⁹ PG&E Answer at 2.

transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric customer.

27. Further, it appears that service to the requested new delivery points on the basis that the customer (Glenn-Colusa) was being provided service on the date of enactment of FPA section 212(h) is precluded by the Commission-approved settlement agreement among PG&E, Western, the Pooling Authority and the Pooling Authority Participants.⁴⁰ Section 7 of the Settlement Agreement provides, in pertinent part:

the Parties agree that the Pooling Authority participants are not entitled to any additional delivery points *on the basis that they are or were “ultimate consumers” receiving electric service from Western on October 24, 1992, as described in Section 212(h)(2)(B) of the Federal Power Act.*⁴¹ (emphasis added).

28. Given section 7 of the Settlement Agreement, it does not appear that the Pooling Authority could satisfy the first clause under section 212(h)(2)(B). Thus the Pooling Authority would not be entitled to receive service under PG&E’s Wholesale Distribution Tariff unless it is able to show that its service request satisfies the requirements set forth in the second part of FPA section 212(h)(2)(B) (i.e., that it would utilize transmission or distribution facilities that it owns or controls to deliver energy to the new delivery points in the Glenn-Colusa Irrigation District). The Pooling Authority, however, does not provide sufficient details or evidence supporting many of its pertinent statements, including a statement that it controls distribution facilities. It is also unclear how its alleged control of distribution facilities used to serve Reclamation District 108 is relevant to the requirement in section 212(h)(2)(B) that the Pooling Authority must own or control distribution facilities utilized to deliver energy to the new delivery points in the Glenn-Colusa Irrigation District. These are issues of material fact that require further information and investigation.

29. Since these issues of material fact cannot be resolved on the basis of the paper record in this proceeding, we establish a trial-type hearing before an Administrative

⁴⁰ The settlement agreement was approved in *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,255 (2004).

⁴¹ See *Pacific Gas and Electric Co.*, Errata and Compliance Filing, Appendix C, Docket No. ER04-688-002 (filed Jan. 3, 2005).

Law Judge to address these factual issues.⁴² We, however, encourage the parties to make every effort to settle their dispute before hearing procedures are commenced.

30. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁴³ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁴⁴ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

31. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as amended by section 1285 of the Energy Policy Act of 2005,⁴⁵ requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,⁴⁶ we will set the refund effective date at the earliest date possible, i.e., the date of the filing of the complaint, which is October 21, 2009.

32. Section 206(b) of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to

⁴² *Cajun Elec. Power Coop. v. FERC*, 28 F.3d at 177.

⁴³ 18 C.F.R. § 385.603 (2009).

⁴⁴ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

⁴⁵ 16 U.S.C. §824e(b) (2006).

⁴⁶ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

when it reasonably expects to make such a decision. Based on our review of the record, we expect that if this case does not settle, the presiding judge should be able to render a decision within six months of the commencement of hearing procedures or, if the case were to go to hearing immediately, by July 30, 2010. We thus estimate that if the case were to go to hearing immediately we would be able to issue our decision within approximately four months of the filing of briefs on and opposing exceptions, or by January 19, 2011.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205, 206 and 309 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the issues identified in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) The refund effective date established pursuant to section 206(b) is October 21, 2010.

By the Commission. Commissioner Norris voting present.

(S E A L)

Kimberly D. Bose,
Secretary.